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20 IN THE UNITED STATES DISTRICT COURT
21
22 FOR THE NORTHERN DISTRICT OF CALIFORNIA

23
24 **CENTER FOR BIOLOGICAL DIVERSITY,** Plaintiff,
25
26 v.
27
28 **CHARLTON H. BONHAM, in his official capacity as Director of the California Department of Fish and Wildlife,** Defendant,
and
PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS and INSTITUTE FOR FISHERIES RESOURCES, Intervenor-Defendants.

Case No. 3:17-cv-05685-MMC

FIFTH POST-STAY JOINT STATUS REPORT

Judge: Hon. Maxine Chesney
Trial Date: None scheduled
Action Filed: October 3, 2017

1 Plaintiff Center for Biological Diversity (the Center), Defendant Charlton H. Bonham, in
2 his official capacity as Director for the California Department of Fish and Wildlife, and
3 Intervenor-Defendants Pacific Coast Federation of Fishermen's Associations (PCFFA) and the
4 Institute for Fisheries Resources (IFR) (collectively, the "Parties") respectfully submit this *fifth*
5 post-stay joint status report. The first four post-stay joint status reports were submitted pursuant
6 to the Court's March 26, 2019 Order (Dkt. No. 72). This fifth post-stay joint status report is
7 submitted pursuant to the Court's November 16, 2020 Order (Dkt. No. 80), which extended the
8 original stay established by the March 26, 2019 Order (Dkt. No. 72).

9 **BACKGROUND**

10 Plaintiff filed a complaint on October 3, 2017, alleging that Defendant has caused and is
11 causing the "illegal 'take' of threatened and endangered humpback whales, endangered blue
12 whales, and endangered Pacific leatherback sea turtles." (Dkt. No. 1.) Plaintiff's complaint
13 challenged Defendant's "authorization, permitting, licensing, overseeing, and management of the
14 California commercial Dungeness crab fishery," which Plaintiff alleged "is killing, injuring,
15 harming, capturing, and otherwise causing 'take' of humpback whales, blue whales, and
16 leatherback sea turtles in violation of" Section 9 of the Endangered Species Act. *Id.*; 16 U.S.C. §
17 1538.

18 Defendant filed an answer to Plaintiff's complaint on November 17, 2017, admitting and
19 denying certain of Plaintiff's allegations. (Dkt. No. 15.) After successfully intervening,
20 Intervenor-Defendants filed an answer to Plaintiff's complaint on April 16, 2018, incorporating
21 Defendant's responses in its answer, and admitting and denying certain of Plaintiff's allegations.
22 (Dkt. No. 41.)

23 The Parties filed cross-motions for summary judgment in this case and appeared for oral
24 argument on the motions on February 22, 2019. After the matter was deemed submitted,
25 Defendant requested that the Court hold off on a ruling pending further settlement discussions.
26 Those further settlement discussions were fruitful. The Parties submitted a Stipulation and Order
27 Staying the Case, which this Court signed on March 26, 2019. (Dkt. No. 72.)

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1 The parties later stipulated to extend the original stay, and that original stay was extended
2 through this Court's Order of November 16, 2020. (Dkt. 80.) The November 16, 2020 Order
3 Staying the Case required that the Parties to submit a joint status report every six months as the
4 Parties work through their settlement commitments.

CURRENT STATUS

6 Since the stay was implemented, the California Department of Fish and Wildlife (CDFW)
7 has made substantial progress toward its settlement obligations and has outlined those significant
8 steps in the previous post-stay joint status reports.

9 Since the last joint status report, CDFW has undertaken the steps outlined below. Citations
10 below refer to Exhibit A of this Court's November 16, 2020 Order (Dkt. No. 80) so that the Court
11 and all Parties can correlate CDFW's actions with progress toward its settlement commitments.

12 Of importance, the update presented below is not cumulative. The update presented below
13 covers activities undertaken or reported by CDFW since the last update (Dkt. 78).

I. Risk Assessment Steps Undertaken Between November 13, 2020 and May 14, 2021

A. Exhibit A, Section I(c)(i)

16 CDFW performed risk assessments periodically. To inform each risk assessment, CDFW
17 compiled and distributed data gathered from NOAA, CDFW landings, whale-watch cruises,
18 fishing fleet vessel surveys, independent researchers, NMFS scientific surveys, and fishery whale
19 experts. In coordination with the Working Group, CDFW performed entanglement risk
20 assessments on the days listed below, and expects to conduct an additional risk assessment on
21 May 17, 2021

- December 11, 2020;
- January 15, 2021;
- February 18, 2021;
- March 18, 2021;
- April 1, 2021;
- April 14, 2021; and
- May 3, 2021.

1 The entanglement risk assessments were supported by CDFW's aerial surveys conducted
2 on the following days:

3 • November 16, 2020;
4 • November 19, 2020;
5 • December 5, 2020;
6 • December 6, 2020;
7 • January 11, 2021;
8 • March 10, 2021;
9 • March 26, 2021;
10 • March 27, 2021; and
11 • April 11, 2021.

12 **B. Exhibit A, Section I(c)(iii)(2)**

13 CDFW consulted with PCFFA and the Center for risk assessments on December 11, 2020;
14 March 18, 2021; and May 3, 2021.

15 **C. Exhibit A, Section I(c)(iii)(4)**

16 On April 1, 2021 CDFW evaluated whether the fishery remained at a low entanglement risk
17 in consideration of whether it was necessary to limit fishing activity to only ropeless gear in
18 Districts 10 and south. Given the low risk across all criteria, the fishery remained open under a
19 Fleet Advisory.

20 The Center's position is that the settlement agreement requires that Districts 10, 17, and
21 south must close on April 1, 2021 (and every year thereafter on April 1 until CDFW receives an
22 incidental take permit). CDFW may open the fishery in this area only at the next scheduled risk
23 determination (which this year occurred on April 14, 2021), if that determination demonstrated no
24 entanglement risk.

25 Although CDFW disagrees with the Center's position on this point, CDFW and the Center
26 have been discussing the concerns to avoid misunderstanding.

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1 **II. Rulemaking Steps Undertaken Between March 26, 2020 and September 26, 2020**

2 **A. Exhibit A, Section III(a)(iii)(1)**

3 CDFW has completed the first year of the Trap Gear Retrieval Program to allow permitted
4 entities to retrieve lost or abandoned commercial Dungeness crab trap gear after the close of the
5 season. Seven permits were issued with 13 retrievers participating. Over 520 traps were
6 retrieved with good reviews regarding the program from the industry. Participation came from
7 nine ports, extending from Monterey to Crescent City.

8 **B. Exhibit A, Section III(d)(iii)**

9 The new RAMP regulations require biweekly reporting of fishing activity and location.
10 CDFW has used this newly-available data to inform risk assessments. Although compliance is
11 less than 100% on this reporting requirement, CDFW is making best efforts to increase
12 compliance rates. In the meantime, landings data is used to approximate a maximum potential
13 level of fishing activity.

14 **C. Additional Rulemaking Steps**

15 In coordination with the Fish and Game Commission, CDFW is working on developing
16 regulations to address potential entanglement risk in the recreational Dungeness crab fishery. The
17 Commission approved final regulations at its meeting on December 9, 2020. Pending approval
18 from the Office of Administrative Law (OAL), CDFW anticipates the new regulations will
19 become effective on November 1, 2021 (in advance of next recreational crab season).

20 **III. Other Steps Undertaken Between November 13, 2020 and May 14, 2021**

21 **A. Exhibit A, Section III(a)(i)**

22 As noted in earlier reports, CDFW submitted its draft Conservation Plan (CP) to NMFS on
23 May 15, 2020. CDFW has continued to develop this CP during this reporting period, and is on
24 track to submit a final draft to NMFS by March 2022, or sooner..

25 **B. Exhibit A, Section III(a)(v)**

26 As noted above, all CDFW risk assessments were conducted in coordination with the
27 Working Group. CDFW continued to support Working Group meetings, transitioning the

1 Working Group to fully remote meetings. All materials and outcomes from the Working Group
2 meetings are available on CDFW's Whale Safe Fisheries website:

3 <https://wildlife.ca.gov/Conservation/Marine/Whale-Safe-Fisheries>

4 **C. Exhibit A, Section III(b) and III(c)**

5 CDFW has taken additional steps to develop modeling for the presence of whales and sea
6 turtles. For example, CDFW has requested and advocated for funding from the Ocean Protection
7 Council (OPC) for the EcoCast model on the following dates: July 31, 2019; August 26, 2019;
8 September 25, 2019. CDFW has also coordinated with OPC to develop priority informational
9 needs and data gaps in the RAMP regulations. CDFW has supported OPC's award of two-
10 million dollars in funding to the Pacific States Marine Fisheries Commission (PSMFC) for a
11 competitive grant process targeting, among other things, the development of models indicating
12 whale and sea turtle presence. After funding awards, CDFW supported PSMFC in project review
13 and the approval process by participating in the application evaluation process.¹ Finally, CDFW
14 anticipates supporting the Southwest Fisheries Science Center's sea turtle tagging this summer
15 should COVID safety protocols allow. This work was put on hold in 2020 due to the pandemic.

16 **D. Exhibit A, Section III(d)**

17 CDFW continues to support Solar Logger testing and continues efforts to recruit volunteer
18 crab vessel permit holders, including requests to PCFFA and other industry groups. CDFW has
19 coordinated with PSMFC to help with distribution of additional units for a pilot program PSMFC
20 is running. All of the 40 units available through OPC funding were distributed.

21 **E. Exhibit A, Section III(e)**

22 CDFW has continued to support gear innovation testing, and undertaken the following steps
23 toward alternative gear development:

24 1. CDFW is exploring alternative gear testing (including pop-up gear) and has
25 developed testing guidance and has identified partners/funding for operations. The primary
26 partners are the National Marine Sanctuary Foundation and OPC.

27 _____
28 ¹ These activities precede the current reporting period and are mentioned now because
they had not yet been highlighted in a previous report.

1 2. CDFW has supported OPC authorization of funding to the National Marine
2 Sanctuary Foundation to coordinate testing of gear innovations that would reduce frequency
3 and severity of entanglements

4 3. Pursuant to the recently adopted regulation formalizing the Risk Assessment
5 and Mitigation Program (RAMP; required under the settlement agreement), CDFW
6 evaluated one application to authorize alternative gear (which it eventually declined to
7 authorize), and is currently evaluating a second proposal.

8 4. CDFW conducted a conference call with staff from the Massachusetts
9 Department of Fish and Game on April 20, 2021 to discuss development of whale-safe trap
10 gear, including extensive discussion about ropeless gear development and additional
11 discussion on lost and abandoned trap gear retrieval.

12 5. CDFW has coordinated with the Office of National Marine Sanctuaries, NMFS,
13 and researchers related to development of interoperable ropeless system development.
14 Interoperability across system platforms would help the public and CDFW more easily
15 locate and identify gear.

16 **F. Exhibit A, Multiple Provisions**

17 CDFW has taken management action to reduce entanglement risk through the following
18 actions:

- 19 1. November 24, 2020 – CDFW delayed the opening of the fishery.
- 20 2. December 11, 2020 – CDFW delayed the opening of the fishery until December
21 23 and issued a Fleet Advisory.
- 22 3. March 17, 2021 – CDFW issued a Fleet Advisory statewide.
- 23 4. May 3, 2021 – CDFW continued statewide Fleet Advisory, and implemented a
24 Depth Constraint north of the Sonoma/Mendocino county line to prohibit fishing activity in
25 waters deeper than 30 fathoms.

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1 **IV. No Objection to Filing Joint Status Report**

2 The Center, PCFFA and IFR do not have direct knowledge of all of the actions outlined
3 above, but have read this report and do not object to it being filed as a Joint Status Report.

4 The Center believes that CDFW is not adequately implementing the April 1 default closure
5 of the fishery described in Exhibit A Section I(c)(iii)(4) and will further discuss this issue with
6 counsel for CDFW pending the Parties' next status report.

7 Although CDFW disagrees with the Center's belief on this point, CDFW and the Center
8 have been discussing the concerns to avoid misunderstanding.

9 Dated: May 14, 2021

Respectfully submitted,

10 /s/ Gary Alexander
11 Gary Alexander
12 Deputy Attorney General
13 OFFICE OF THE ATTORNEY GENERAL

14 *Attorney for Defendant Charlton H. Bonham*

15 /s/ Catherine Kilduff
16 Catherine Kilduff
17 Kristen Monsell

18 *Attorneys for Plaintiff
19 Center for Biological Diversity*

20 /s/ Glen Spain
21 Glen Spain

22 *Attorney for Intervenors Pacific Coast
23 Federation of Fishermen's Association and
24 Institute for Fisheries Resources*

25 **ATTESTATION**

26 I, Gary Alexander, am the ECF user whose identification and password are being used to
27 file this Joint Status Report. In compliance with L.R. 5-1(i), I attest that the other signatories
28 have concurred in this filing.

29 DATED: May 14, 2021

30 /s/ Gary Alexander

CERTIFICATE OF SERVICE

Case Name: ***Center for Biological Diversity v. Charlton H. Bonham*** Case No. **3:17-cv-05685-MMC**

I hereby certify that on May 14, 2021, I electronically filed the following document with the Clerk of the Court by using the CM/ECF system:

FIFTH POST-STAY JOINT STATUS REPORT

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 14, 2021, at San Francisco, California.

G. Guardado
Declarant

/s/ G. Guardado
Signature

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